The UDHR and the Group: Individual and Community Rights to Culture

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The deliberate omission of minority rights from the Universal Declaration of Human Rights (UDHR) is suggested to be the basis for the fundamental tension between individual and group rights. This historical background is critical to contemporary discussions of community rights to culture, particularly in the context of traditional cultural expressions and knowledge, as well as in the context of genetic and natural resources. With respect to traditional community knowledge and rights to culture, this primacy of the individual is potentially limiting. This paper examines international developments in the protection of traditional and indigenous knowledge, and the complex and at times, discordant relationship between human rights protection and traditional communities. It will consider the impact of that original omission in the UDHR in the context of contemporary discussions of group rights and the right to culture, and the protection of community knowledge as part of the conditions necessary for an individual member of a minority to access that right. Indeed, perhaps the architecture for group rights to culture is necessarily the prerequisite for an individual's effective cultural participation. Land and rights to land are necessarily relevant to community knowledge not only directly, with respect to access and management of resources, but also indirectly in terms of the knowledge embedded in the land and in the identity derived from the

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connection to land and nature. Indeed, legal frameworks governing native title claims and rights to lands have been invoked as possible mechanisms for the protection of cultural practices associated with the land. However, the success of such claims has been limited to date.

While the need to facilitate access to land as a resource for food and agriculture is clearer in international law, less attention is paid to land as a mechanism for the transmission of knowledge including that of traditional cultural expressions. In this respect, there may be some interaction between land rights and individual human rights to cultural life, in that the land itself may emerge as a mechanism for realising individual's right to culture and to benefit from one's creative output.[2] Indeed, the recent Sixth Session[3] of the UN Permanent Forum on Indigenous Issues (PFII) took as its theme 'Territories, Lands and Natural Resources' with its recommendations identifying distinct links between land and cultural rights:

> Land is the foundation of the lives and cultures of indigenous peoples all over the world. This is why the protection of their right to lands, territories and natural resources is a key demand of the international indigenous peoples' movement and of indigenous peoples and organizations everywhere. It is also clear that most local and national indigenous peoples' movements have emerged from struggles against policies and actions that have undermined and discriminated against their customary land tenure and resource management systems, expropriated their lands, extracted their resources without their consent and led to their displacement and dispossession from their territories. Without access to and respect for their rights over their lands, territories and natural resources, the survival of indigenous peoples' particular distinct cultures is threatened.
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> Land rights, access to land and control over it and its resources are central to indigenous people throughout the world, and they depend on such rights and access for their material and cultural survival. In order to survive as

[2] Article 15.1(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

[3] Permanent Forum on Indigenous Issues. Sixth Session. 14-25 May 2007.

> distinct people, indigenous people and their communities need to be able to own, conserve and manage their territories, lands and resources.[4]

The question is not that of whether tradition as such may be the subject matter of a human right, but whether indigenous and traditional groups will be able to realise the right to benefit in a culturally relevant and appropriate way if that mechanism of tradition is not sustained. Interference with traditional practices relating to the land may be argued as unjustifiable interference with individual human rights. In that traditional relationships to knowledge and cultural expression generally speaking are articulated upon a relationship to the land, land ownership or guardianship is thus instrumental in recognising interests and achieving relevant and effective protection of traditional cultural expression:

> The image is associated with a place on Rirratjingu land called Yalangbara (which is at Port Bradshaw south of Yirrkala) and represents the events associated with the Djangkawu that took place there. My rights to use this image arise by virtue of my membership of the land owning group. The right to use the image is one of the incidents arising out of land ownership … Aboriginal art allows our relationship with the land to be encoded, and whether the production of artworks is for sale or ceremony, it is an assertion of the rights that are held in the land. The place, Yalangbara, and the particular story of the Djangkawu associated with it do not exist in isolation. They are part of a complex or "dreaming track" stretching from the sea off the east coast of Arnhem Land through Yalangbara, across the land to the west of Ramingining and Milingimbi.[5]

Stewardship of the land thus gives rise to the traditional right to knowledge, and the use and dissemination of knowledge is characterised upon this relationship to the land. Significantly, relevant access to the land appears to be tied to the fundamental right

[4] Permanent Forum on Indigenous Issues. Report of the Sixth Session. 14-25 May 2007. E/2007/43; E/C. 19/2007/12. Pages 2-3.

[5] Banduk Marika, Indigenous Australian artist, speaking about the painting, Djanda and the Sacred Water Hole, quoted in Janke T (2003) *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, Geneva, WIPO: 11.

provided in Article 27 of the International Covenant on Civil and Political Rights (ICCPR): "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." Land is a critical and contested zone in interpretations of the right to self-determination and indeed in the meaningful realisation of that right for indigenous people.[6] The recently adopted Declaration on the Rights of Indigenous Peoples (the UN Declaration)[7] articulates this relationship between land and knowledge as the mechanism by which to give effect to the right to self-determination – not as alienable property but as cultural archive, narrating and preserving the historical and cultural stories of the community through the land.

What is Traditional Community Knowledge?

> The impetus for the creation of artwork remains important in ceremony, and the creation of artwork is an important step in the preservation of important traditional customs. It is an activity which occupies the normal part of the day-to-day activities of the members of my tribe and represents an important part of the cultural continuity of the tribe.[8]

Identification of knowledge holders depends upon a suitable concept of community as a legal actor. A suitable mechanism by which to identify, negotiate with and return benefits to the community is necessary notwithstanding the legal framework within which that knowledge is being navigated. Of fundamental importance, interests of cultural and social

[6] Land has been raised as one of the more controversial areas over two decades of negotiations toward the Declaration on the Rights of Indigenous Peoples (GA Res 61/295), 13 September 2007. In an official fact sheet, the United Nations Permanent Forum on Indigenous Issues refers to significance of the dialogue and the long negotiations, identifying land as one of the areas of intense debate. See the PFII Frequently Asked Questions: Declaration on the Rights of Indigenous Peoples http://www.un.org/esa/socdev/unpfii/documents/faq_drips_en.pdf.

[7] Declaration on the Rights of Indigenous Peoples. Adopted by General Assembly Resolution 61/295, 13 September 2007.

[8] Indigenous artist Mr Bulun quoted in Golvan C (1989) "Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun" 11(10) *European Intellectual Property Review* 346: 348.

integrity and indeed dignity, cultural identity, and political and economic interests are common throughout the groups involved. The relationship between the cultural diversity and identity of the group, and the integrity of the knowledge and its management, arguably underpins the entire body of development in the area of traditional knowledge.[9] Knowledge is produced and maintained, not as an end or a product in itself, but, rather, as part of the cultural activity and sustainability of a particular traditional and indigenous group.

A second unifying aspect for the communities involved is the actual exploitation of the resources outside the community. This includes cases of actual removal (for example: genetic resources and the bioprospecting for plants and related medicinal and agricultural knowledge; removal of cultural artifacts) or removal through cultural transformation (for example, the diminishing of cultural value in a symbol through offensive use). Indeed, it is useful to recognise the practice of appropriation of resources in the context of colonial imperialism. This historical context has been identified as significant not only within legal practice but also by anthropologists and archaeologists advising upon appropriate and effective mechanisms for negotiation with communities.

Finally, there are common issues in the creation of rights in harvested or appropriated knowledge without reference to the context in which that knowledge was obtained. In other words, the ethical context for appropriation can be relevant not only to the creation of intellectual property rights (with international discussions considering prior informed consent and disclosure of origin as mandatory criteria), but also in

[9] Janke T (2001) "'Berne, Baby, Berne': The Berne Convention, Moral Rights and Indigenous Peoples' Cultural Rights" 5(6) *Indigenous Law Bulletin* 14.

recognising the autonomy of communities and achieving effective and successful negotiation and mediation with communities to the benefit of all parties.

Communal 'Ownership' and Customary Principles of Access

The dominant discourse on traditional knowledge and its management is inextricably bound to notions of self-determination, cultural diversity and cultural identity: "Late twentieth-century cultural politics make it impossible to separate issues of identity from claims to the ownership of resources."[10] This includes arguments, particularly in North America, for privacy as a property mechanism for the protection of traditional and indigenous relationships to cultural resources. But the application of privacy is quite limited in most circumstances.[11] More usually the concerns of indigenous and traditional groups are framed as battles of self-determination, (a group self or identity, as it were) constructed upon the issue of dominion over resources.[12] Therefore, human rights doctrine continues to provide an oversight for the negotiation of community knowledge through various legal frameworks and contexts.

The diversity of traditional and indigenous communal structures converges in the importance of familial, kinship and initiatory ties with respect to resources.[13] This is distinct from proprietary relationships to resources, but certainly does not preclude the

[10] Strathern M (1999) *Property, Substance and Effect: Anthropological Essays on Persons and Things*, London, Athlone P: 134.

[11] Brown MF (2003) *Who Owns Native Culture?* Cambridge MA, Harvard UP: 38.

[12] See the Indigenous Peoples Council on Biocolonialism (IPCB) (2004) CBD's International Regime: Indigenous Activist Organizations Call for No Access Zones to Genetic Resources and Indigenous Knowledge. Press Release. 4 February 2004.

[13] Leach J (2004) "Land, Trees and History: Disputes Involving Boundaries and Identities in the Context of Development" in Kalinoe L & Leach J (eds) *Rationales of Ownership: Transactions and Claims to Ownership in Contemporary Papua New Guinea*, Wantage, Sean Kingston Publishing: 42-56. See further the critique of property models in undertaken by Rosemary Coombe (1998) *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law*, Durham, Duke UP.

relevance of commercialisation of resources for communities in ways compatible with the customary management of those communities. In other words, commercialisation is often relevant to such groups, but is in possible deference to earlier rights within customary systems of managing that knowledge.

Furthermore, rejection of 'ownership' as such undermines community knowledge claims in that it constructs such knowledge as natural, authorless, ownerless and part of the common heritage, in ways comparable to scientific and colonial imperialism of the eighteenth and nineteenth centuries. Therefore, the assumption of communal or shared ownership on the part of traditional communities is often an inappropriate simplification of customary systems and knowledge management.[14]

Communal Principles of Identity

"The clan is like a cluster of trees which, when seen from afar, appear huddled together, but which would be seen to stand *individually* when closely approached." [15]

The critical relationship between knowledge and community, and between communalism and individual cultural identity, underpins arguments for specific treatment of traditional knowledge outside the conventional intellectual property framework:

> If one is by nature a social being, and not merely an atomized entity, then the development of one's full personality and identity can best be achieved only within the framework of social relationships that are realizable within a communal social system. That is to say, the conception and development of an individual's full personality and identity cannot be separated from his or her role in the group.[16]

[14] See the critique of "communal rights" in the context of Papua New Guinean communities in Strathern M (1999) *Property, Substance and Effect: Anthropological Essays on Persons and Things*, London, Athlone P: 3.

[15] Akan Proverb. Quoted in Gyekye K (1995) *An Essay on African Philosophical Thought: The Akan Conceptual Scheme*, Revised ed, Philadelphia, Temple UP: 158.

[16] Gyekye K (1995) *An Essay on African Philosophical Thought: The Akan Conceptual Scheme*, Revised ed, Philadelphia, Temple UP: 161.

In this way, the traditional community management of knowledge, according to customary systems, is intimately linked to issues of cultural diversity, individual dignity and self-determination. In traditional and indigenous philosophies of communalism, as discussed in the previous section, the individual dignity and identity is derived from community membership. Indeed, this is one of the many reasons why suggestions of incorporation and other systems of hierarchisings proprietary management are never entirely relevant to the protection of community knowledge. A community is managed by all its members, whereas a corporation displaces that engagement to nominated directors, in defiance of the differentiated management beyond simple linear corporate streams. Therefore, at stake are not only the possible group rights of communities, but also the individual rights to take part in cultural life and to benefit from creative output in the context of communal expression.[17]

Challenges for Human Rights Principles

The application of international human rights framework to community knowledge is not necessarily seamless. Most importantly, the ability of human rights doctrine to deal with cultural groups remains uncertain in this area of legal scholarship. Nevertheless, human rights principles present significant potential for oversight of the negotiation of traditional knowledge within various legal frameworks:

> The imbalances in the intellectual property law system have been created and are sustained by established mechanisms of accessing the modern economic space and power. Indigenous and local people often experience insecure resource tenure, are financially weak, and lack institutional arrangements to safeguard their property rights. Thus, the issues extend to

[17] Article 15.1(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

> fundamental and more complex questions of human rights of the peoples.[18]

Criticism for neglecting the duty of respect for cultural diversity has been made throughout the literature on the construction of culture within human rights discourse.[19] Whether articulated through minority rights or indigenous rights, respect for cultural diversity is the fundamental obligation at the center of the discourse on genetic resources, traditional knowledge and traditional cultural expressions. In this context, the varying approaches to group rights are problematic, and the disjunction between individual human rights and the interests of traditional and indigenous communities has genuine impact.

(a) Minority Rights

Although some commentators argue that minority rights are indeed human rights,[20] their development in international law is nevertheless built upon an original and deliberate omission of minority rights from the UDHR. This omission is premised on the notion that the right to 'culture' can be achieved by the individual and through individual human rights. Indeed, this presumes a uniform community as 'collective' as distinct from the highly differentiated groups involved, and potentially neglects the achievement of individual rights to identity and dignity through membership of the community, as discussed earlier.

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[18] Mugabe J (2001) Intellectual Property, Traditional Knowledge and Genetic Resources: Policy Options for Developing Countries. WIPO & the National Intellectual Property Association of Bulgaria, International Conference on Intellectual Property, the Internet, Electronic Commerce and Traditional Knowledge. 29-31 May (WIPO/ECTK/SOF/01/3.1): 16.

[19] Tully J (1995) *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge, Cambridge UP.

[20] Morsink J (1999) "Cultural genocide, the Universal Declaration, and minority rights" 21(4) *Human Rights Quarterly* 1009: 1053-60.

Similarly, Article 27 of the ICCPR emphasizes the "individual" agent in human rights law: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."[21] Although this provision appears to acknowledge the cultural rights of a group; however, this is articulated through an individual right.

The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Declaration on Minorities)[22] also maintains a similar construction of rights as individual and not as group rights. The very title itself – "Persons Belonging to" – makes clear that this Declaration concerns individual rights as distinct from recognising any rights in minorities as groups.[23]

It is therefore in the access to cultural rights as an individual within a minority that may be relevant to community knowledge in this context. Article 2 of the Declaration on Minorities provides for these individual rights to culture:

> 1. Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.
>
> 2. Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.

[21] International Covenant on Civil and Political Rights (ICCPR) Article 27.

[22] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Adopted by General Assembly resolution 47/135 of 18 December 1992.

[23] See the discussion of the debate concerning the title in Steiner HJ & Alston P (eds) (1996) *International Human Rights in Context: Law, Politics, Morals* (Oxford, Clarendon P): 1297.

Despite this emphasis on individual human rights, the State's obligation to maintain the circumstances necessary for an individual citizen to enjoy basic human rights may necessitate the protection of community knowledge as part of the circumstance necessary for an individual member of a minority to enjoy basic human rights to culture, as provided in Article 4:

> Article 4
>
> 1. States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.
>
> 2. States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.
>
> 3. States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.
>
> 4. States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole.
>
> 5. States should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country.

A further motivation for those striving for international consensus on protection within the World Intellectual Property Organization, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) is arguably the vulnerability of minorities within international human rights discourse. In particular, it is subject to ongoing debate whether there is any corresponding positive duty toward cultural diversity in that process. However, most significantly, the question

of group rights is a persistent challenge for recognition of traditional community 'authorship' and management.

(b) Indigenous Rights as Group Rights

Arguments for group rights in the context of indigenous human rights have been rejected as unnecessary (because individual human rights are sufficient) or simply outside the framework of human rights (on the basis of their collective nature).[24] However, the collective qualities of indigenous interests and rights continue to be emphasised by indigenous people when it comes to the development of international standards with respect to indigenous rights.

Notably, and in distinct contrast to the Declaration on Minorities, the recently adopted UN Declaration (13 September 2007)[25] emphasises collective interests in its very own name. As discussed previously, the use of "Persons Belonging to" in the full title of the Declaration on Minorities establishes that such rights are recognised as rights of the individual belonging to a minority, rather than minorities themselves. On the other hand, the UN Declaration clearly establishes its scope as that of indigenous rights as individual, group or collective rights. This emphasis on the collective nature of indigenous rights is continued throughout the UN Declaration.

Although the UN Declaration is not legally binding, its recent adoption by the General Assembly is nevertheless a significant influence in international standard-setting with respect to indigenous rights. Most importantly, Resolution 143 of the 42nd General Assembly (1987), "Human Rights in the Administration of Justice," establishes an

[24] Thornberry P (2002) *Indigenous Peoples and Human Rights*, Manchester, Manchester UP: 3-6.

[25] Declaration on the Rights of Indigenous Peoples. Adopted by General Assembly Resolution 61/295, 13 September 2007.

overarching commitment to human rights principles in the establishment of standards. This has been interpreted as an intention to harmonise standard setting in international fora, such that the preparation and adoption of any instrument in one forum of the UN must necessarily give effect to human rights instruments in the UN system. The intergovernmental committee discussions currently underway within the World Intellectual Property Organisation (WIPO), as a UN specialised agency, are therefore interpreted as necessarily bound by the principles of the recently adopted UN Declaration.

Furthermore, the negotiation of the UN Declaration is part of the historic significance of this instrument, being a genuine negotiation between the states and the beneficiaries of the instrument. Indigenous people were direct participants in the process and a pre-condition of its adoption by the UN General Assembly was its acceptance by a united indigenous peoples' caucus. The general agreement was that states would not pass a document that was not supported by the indigenous peoples themselves:

> Kofi Annan, UN Secretary General, has made a point of his mission in the last two terms, to 'democratize' the way the UN goes about its work. That is, leadership is firmly in the hands of the member states, as represented by their delegations, and that other voices - non-governmental voices, specialist voices, indigenous voices - also contribute valuable information in the fora of this institution. Here, in the development of this Declaration, is a case in point. We can all use this process as a model.[26]

(c) Right to Self-Determination

The principle of self-determination first appeared in the Charter of the United Nations,[27] and subsequently in both the International Covenant on Civil and Political

[26] Mokhiber C, Officer in Charge, New York Office of the High Commissioner for Human Rights. Panel on the United Nations Declaration on the Rights of Indigenous Peoples. 4 November 2006.

[27] UN Charter Article 1(2), and Article 55.

Rights (ICCPR)[28] and in the International Covenant on Economic, Social and Cultural Rights (ICESCR)[29] and in several other international instruments.[30] Despite this controversy and dissensus on group rights, the right to self-determination remains particularly relevant to community knowledge and is emphasised by indigenous peoples. Nevertheless, the right to self-determination is inconsistent in international human rights law and scholarship.[31] However, the United Nations bodies regularly recognise the right on the part of existing states, adding weight to the right as a principle of international customary law.[32] Indeed, these provisions of the UN Declaration were emphasised at the recent intergovernmental committee meeting in Geneva in the last week of February 2008.[33]

The relevance of the right to indigenous peoples is evident in its emphasis in the UN Declaration, but the right is not necessarily effective in the protection of community knowledge if the traditional management of resources is seen as challenging national interests.[34] Given that the link between international trade and intellectual property is one of the driving pressures on the work of the WIPO IGC,[35] it is unclear whether self-

[28] International Covenant on Civil and Political Rights (ICCPR) Article 1.

[29] International Covenant on Economic, Social and Cultural Rights (ICESCR) Article 1.

[30] The Declaration on the Granting of Independence to Colonial Countries and Peoples, Articles 1, 2, 4, and 7. Adopted by General Assembly Resolution 1514(XV); Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, Articles 1 and 3. Adopted by General Assembly Resolution 2625(XXV), 24 October 1970, confirmed in 2003 in "Promotion of peace as a vital requirement for the full enjoyment of all human rights by all," Commission on Human Rights Resolution 2003/61, adopted 24 April 2003.

[31] Falk R (1997) "The Right of Self-Determination Under International Law: The Coherence of Doctrine Versus the Coherence of Experience," in Danspeckgruber W & Watts A (eds), *Self-Determination and Self-Administration* 47: 55 at 61.

[32] The Commission on Human Rights has voted in favour of the Palestinian people's right to self-determination, granting significant acknowledgement to the right within the United Nations system. See, for example, the adoption of resolution E/CN.4/2004/L.8 at the 44th meeting of the Commission on Human Rights, 8 April 2004.

[33] The complete documents from the 12th Session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, are available at http://www.wipo.int/meetings/en/details.jsp?meeting_id=14802.

[34] Wright S (2001) *International Human Rights, Decolonisation and Globalisation: Becoming Human*, London, Routledge: 153-54.

[35] WIPO/RT/LDC/1/14 (September 29, 1999): Paragraph 10. See also WIPO/GRTKF/IC/4/8 (30 September 2002): 9.

determination would be subjugated to questions of trade in the context of community knowledge.[36]

Notwithstanding these provisions for the right to self-determination, the problems of identifying those entitled to self-determination and indeed the nature of the principle itself persist, particularly in the context of traditional and indigenous communities. Again, the historical background clarifies its application, with some arguing that the right is applicable only in the context of decolonisation and is thus diminishing in relevance.[37]

The UN Declaration[38] explicitly rejects this distinction. The recent adoption of the UN by the United Nations 61st General Assembly[39] comes more than twenty years after its production was first agreed in 1985 at the 4th Session of the WGIP. A working paper was tabled at the 6th Session of the WGIP, in 1988, with the final text agreed in the 11th Session, 1993. The draft was adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities the following year and submitted to the Commission on Human Rights,[40] remaining in draft form until 2007.

Although its recent adoption[41] by the General Assembly is encouraging, as already mentioned the instrument is nevertheless non-binding and may have little immediate impact at the national level, given the historically almost uniform reluctance to adopt the text for fourteen years. Indeed, this could be in part attributed to persistent 'colonial' suspicions of secession based upon the discourse of colonisation and race.[42] These anxieties regarding the recognition of self-determination can be seen in the interventions of those states voting against adoption: Australia, Canada, New Zealand

[36] Kirgis F, Jr (1994) "The Degrees of Self-Determination in the United Nations Era" 88 *American Journal of International Law* 304.

[37] Charlesworth H & Chinkin C (2000) *The Boundaries of International Law: A Feminist Analysis*, Manchester, Juris-Manchester UP: 152.

[38] Document 61/295, Adopted by the 61st Session of the General Assembly, 13 September 2007.

[39] Four countries voted against its adoption: Australia, New Zealand, Canada and the United States.

[40] Resolution 1994/45, 26 August 1994.

[41] 61st General Assembly, A/Res/61/295.

[42] Wright S (2001) *International Human Rights, Decolonisation and Globalisation: Becoming Human*, London, Routledge: 137-38.

and the United States. For example, Robert Hill (Australia) was reported as stating the following:

> Regarding the nature of the Declaration, he said it was the clear intention of all States that it be an aspirational Declaration with political and moral force, but not legal force … The Australian Government had long expressed its dissatisfaction with the references to self-determination in the Declaration, he said. Self-determination applied to situations of decolonization and the break-up of States into smaller states with clearly defined population groups. It also applied where a particular group with a defined territory was disenfranchised and was denied political or civil rights. The Government supported and encouraged the full engagement of indigenous peoples in the democratic decision-making process, but did not support a concept that could be construed as encouraging action that would impair, even in part, the territorial and political integrity of a State within a system of democratic representative Government.
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> On lands and resources, he said the Declaration's provisions could be read to require recognition of indigenous rights to lands without regard to other legal rights existing in land, both indigenous and non-indigenous.[43]

Arguably, however, the development of the concept of self-determination has continued beyond its foundations in nationalism and territorial capacity. Indeed, the notion of cultural self-determination is particularly relevant in the context of community knowledge and with respect to current developments in rights to culture and cultural diversity.

(d) Right to Cultural Self-Determination

Developments in minority rights to culture and participation has led to development of the concept of so-called third-generation rights to self-determination – the rights of internal cultural self-determination. Arguably, cultural self-determination will be somewhat more significant in the context of community knowledge in that it is specifically dealing with the rights of participation and culture fundamentally related to

[43] United Nations 61st General Assembly. Plenary 13 September 2007. GA/10612

questions of traditional cultural expression and knowledge.[44] Internal self-determination is explained as "forms of self-government and separateness within a state rather than separation (so called 'external' self-determination) from the state".[45] International self-determination therefore indicates customary self-government within the nation-state according to the general political structure of that state.

The Declaration on Minorities[46] is relevant to internal self-determination, despite no explicit reference to self-determination in the text. Nevertheless, it sets out the principles underlying internal self-determination. However, again, the most significant and relevant text is that of the recently adopted UN Declaration, which emphasises and clarifies the right to internal self-determination regardless of the loss of territory and other pressures on the displacement and disenfranchisement of groups.[47]

(e) Cultural Relativism

Calls for *sui generis* protection on cultural bases have also been criticised as problematic cultural relativism.[48] Indeed, the history of cultural relativism is largely borne out of a rejection of the universalising tendencies of human rights discourse.[49] It is

[44] Carlos Correa notes that the protection of traditional knowledge is compatible with accessing the right to self-determination, where such protection gives the community control over resources: Correa C (2002) *Protection and Promotion of Traditional Medicine: Implications for Public Health in Developing Countries*, South Centre-Department of Essential Drugs and Medicines Policy of the World Health Organization (WHO). Correa suggests, "Such control may be an element of self-determination and collective cultural sovereignty" (45).

[45] Steiner HJ & Alston P (eds) (1996) *International Human Rights in Context: Law, Politics, Morals* (Oxford, Clarendon P): 1249.

[46] Adopted by General Assembly Resolution 47/135, 18 December 1992.

[47] See further the discussion in Foster CE (2001) "Articulating Self-Determination in the Draft Declaration on the Rights of Indigenous Peoples" 12(1) *European Journal of International Law* 141.

[48] Steiner HJ & Alston P (eds) (1996) *International Human Rights in Context: Law, Politics, Morals* (Oxford, Clarendon P): 366-68. See further Thornberry P (2002) *Indigenous Peoples and Human Rights*, Manchester, Manchester UP: 7.

[49] Cowan JK et al (2001), "Setting Universal Rights" in Cowan JK et al (eds) *Culture and Rights: Anthropological Perspectives*, Cambridge, Cambridge UP: 27.

this universalist momentum which is similarly criticised by indigenous and traditional groups when examining the impact of intellectual property standards and frameworks upon traditional knowledge and cultural expressions. These same groups have reiterated the need for *sui generis* approaches if the spirit of the UN Declaration is to be realised and the right to self-determination of indigenous groups to be realistically fulfilled.

Article 4 of the Declaration on Minorities[50] is especially relevant in the context of community knowledge, encompassing the relationship of knowledge to the facilitation of the circumstances in which the cultural values and practices pertaining to that knowledge are possible.

> 1. States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.
> 2. States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.
> 3. States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.
> 4. States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole.
> 5. States should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country.

Nevertheless, Article 4.2 provides that the obligation does not arise where the expression of cultural characteristics would be contrary to national law and international

[50] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Adopted by General Assembly resolution 47/135 of 18 December 1992.

standards. In this sense, the nature of the qualification of culture is especially important. This is particularly relevant when considering gross violations of human rights, where an extreme form of cultural relativism may suggest that interference with such violations would be unwarranted. What is important is an appreciation of the culture at stake not as an undifferentiated product, but a dynamic and social process. Cultural characteristics, cultural values and cultural practices thereby articulate aspects of the overarching achievement of the expression of culture.

This is precisely the position taken by the Special Rapporteur to the Sub-Commission on Prevention of Discrimination and Protection of Minorities at the 51st Session. On the impact of traditional practices on the health of women and female children, the Third Report stated: "The Special Rapporteur feels it is essential to act with tact and patience, bringing the communities concerned to understand that their cultural values are not to be confused with cultural practices, and that the practices can be changed without adversely affecting the values as such."[51]

In this regard, current scholarship on cultural identity and cultural diversity is immediately pertinent not only to the clarification of group rights in respect of knowledge, but also with respect to the nature of "culture" within key human rights documents themselves. As Patrick Thornberry, member of the UN Committee on the Elimination of Racial Discrimination (CERD), explains, it is not always possible to partition values and practices in this way: "If a particular practice is bound up intimately with a language, view of the world, creation myth, religious observance and social

[51] Sub-Commission on Prevention of Discrimination and Protection of Minorities. 51st Session. The Implementation of the Human Rights of Women: Traditional Practices Affecting the Health of Women and the Girl Child. E/CN.4/Sub.2/1999/14: page 17.

practice, it cannot easily be 'detached' or 'severed' from 'the body politic'."[52] An understanding of the mechanics of cultural diversity within human rights law is therefore an essential part of community knowledge frameworks.

Cultural Diversity and Cultural Rights

Article 15.1 of the ICESCR obliges the State to recognise the right of every person "to take part in cultural life" as well as a right on the part of each person "to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author" (right to benefit).[53] In a sense, the complete text of Article 15 encompasses not only the contribution to culture on the part of the individual, but also the sense of participation and "benefit" flowing back to the individual:

> 1. The States Parties to the present Covenant recognize the right of everyone:
>
> (a) To take part in cultural life;
>
> (b) To enjoy the benefits of scientific progress and its applications;
>
> (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
>
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
>
> 3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
>
> 4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

[52] Thornberry P (2002) *Indigenous Peoples and Human Rights*, Manchester, Manchester UP: 424.

[53] International Covenant on Economic, Social and Cultural Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27.

In this sense, intellectual property rights provide the mechanism by which individuals access their right to benefit. However, whether such rights are relevant in the context of community knowledge holders is an important aspect of the impact of this provision on developments in other international arenas, including the WIPO IGC.

In the Preamble to the 2001 UNESCO[54] Universal Declaration on Cultural Diversity,[55] 'culture' is defined as "the set of distinctive spiritual, material, intellectual and emotional features of society or a social group," encompassing "in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs." The reference to 'distinctive' indicates observable characteristics, values and practices which distinguish the individual or group,[56] both marking out membership and facilitating membership through recognition. Further, the 2001 Declaration notes that culture is intrinsically linked to questions of "identity and social cohesion, and the development of a knowledge-based economy." From this, the importance of cultural diversity is clear, with diversity being valuable in and of itself to the broader society. Article 1 affirms cultural diversity as "the common heritage of humanity": "As a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity

[54] United Nations Educational, Scientific and Cultural Organization. UNESCO is one of the original specialised agencies of the United Nations, established by its Constitution adopted in London, 16 November 1945. The purpose of the agency, as set out in the Constitution is "to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations."

[55] UNESCO (2001). Universal Declaration on Cultural Diversity. Adopted by the 31st Session of the General Conference of UNESCO, Paris, 2 November 2001.

[56] Thornberry P (2002) *Indigenous Peoples and Human Rights*, Manchester, Manchester UP: 195.

is for nature. In this sense, it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations."[57]

Returning to the discussion of Article 15, the UN Committee on Economic, Social and Cultural Rights 19th Session appears to emphasise cultural diversity as a value in and of itself: "Article 15 of the Covenant could serve as an important antidote to the tendency to homogenize and iron out differences and diversity."[58]

In this context, the value of that diversity is translated into real conditions of societal benefit. In the general discussion of the right to education, one speaker drew explicit links between cultural diversity and the right to education (Article13):

> Mr. Meyer-Bisch stressed that if a country did not enjoy the necessary financial resources to implement the right to education for all, it had the obligation to accept assistance from partners. He emphasized, though, that it was mainly the political price of the right to education for all, rather than resource mobilization, that frightened many Governments, since implementing the right to education presumed the provision of other, concomitant cultural rights, such as linguistic freedom, minority rights, cultural identity and access to cultural properties. The right to education could not be ensured without taking into consideration its important cultural dimensions. The right to education could be implemented more efficiently only by adopting more complex approaches than was currently the case, based on the recognition of all cultural rights.[59]

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[57] UNESCO (2001). Universal Declaration on Cultural Diversity. Article 1.

[58] Committee on Economic, Social and Cultural Rights. Report on the Eighteenth and Nineteenth Sessions. 27 April-15 May 1998; 16 November-4 December 1998. Economic and Social Council. E/1999/22; E/C.12/1998/26. 4 December 1998: para 483.

[59] Committee on Economic, Social and Cultural Rights. Report on the Eighteenth and Nineteenth Sessions. 27 April-15 May 1998; 16 November-4 December 1998. Economic and Social Council. E/1999/22; E/C.12/1998/26. 4 December 1998: para 482. See further, the Report by the Committee on Conventions and Recommendations, 162nd Session, 162/EX/53 Rev, 10 October 2001. On Item 5.3 (on the synthesis of State Reports as part of the permanent system of reporting on education):

> A number of Member States emphasized that, in light of the present world situation and the recent events of 11 September, education for peace, human rights and democracy and the elimination of racism and prejudice is of utmost importance as it concerns directly the future of our societies, and should be at the very heart of the discussions during the 31st session of the General Conference.

In other words, relevant and meaningful access to cultural rights on the part of all citizens (and thus, the consequent diversity in cultural expression) provides the fundamental circumstances for aspects of human development, including effective and successful education. Thus, cultural diversity has a genuine economic dimension.[60]

In this regard, current scholarship on cultural identity and cultural diversity is immediately pertinent not only to the clarification of group rights in respect of knowledge, but also with respect to the nature of "culture" within key human rights documents themselves. As Patrick Thornberry explains, it is not always possible to partition values and practices in this way: "If a particular practice is bound up intimately with a language, view of the world, creation myth, religious observance and social practice, it cannot easily be 'detached' or 'severed' from 'the body politic'."[61] An understanding of the mechanics of cultural diversity within human rights law is therefore an essential part of prospective community knowledge frameworks.

Community and Customary Law

Customary law may be understood as the cohering organisation of community and a necessary mechanism for the sustainability of cultural integrity and identity,

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> They stressed that today culture and cultural diversity should be taken into account when reinforcing education for peace, human rights and democracy.

This link is reinforced by the decision in 2001 of the 162nd Session Executive Board of UNESCO to establish the Joint Expert Group UNESCO (CR) / ECOSOC (CESCR) on the monitoring of the right to education. Paris, 27 November 2001. 162 EX/Decisions.

[60] This link between cultural diversity and economic and other conditions of value is also set out in the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Article 2, 'Guiding Principles', states "Since culture is one of the mainsprings of development, the cultural aspects of development are as important as its economic aspects" (Paragraph 5: Principle of the complementarity of economic and cultural aspects of development). Further, in Paragraph 6 (Principle of sustainable development): "Cultural diversity is a rich asset for individuals and societies. The protection, promotion and maintenance of cultural diversity are an essential requirement for sustainable development for the benefit of present and future generations."

[61] Thornberry P (2002) *Indigenous Peoples and Human Rights*, Manchester, Manchester UP: 424.

cultural diversity and the participation in cultural life. The governance of resources according to traditional customary laws embodies the responsibility to tradition described earlier.

Customary law is the inviolable and integral law of a community established over the history of that community, critical to its identity, binding members of a community, and therefore also identifying and cohering community: "Customary laws and protocols are central to the very identity of many Indigenous, local and other traditional communities."[62] Indeed, the legitimacy of the community inheres in its responsibility to custom and tradition as realised in the observation and practice of its laws: "Maintaining customary laws and protocols can therefore be crucial for the continuing vitality of the intellectual, cultural and spiritual life and heritage of many communities."[63]

Literally, customary law narrates tradition. The appropriation and reproduction of knowledge in ways contrary to traditional forms of governance and management will be contrary to pre-existing customary law. Therefore, there is a potential conflict of laws between customary law and other legal systems that may form the basis for limits to the exercise of the latter in certain circumstances.

This is related to what has been termed the principle of locality, explained by the Chairperson-Rapporteur of the WGIP, Dr Erica-Irene A. Daes, as meaning "every

[62] World Intellectual Property Organisation (WIPO). Issues Paper (Unofficial Draft Version 3.0). Customary Law and the Intellectual Property System in the Protection of Traditional Cultural Expressions and Knowledge: page 5.

[63] World Intellectual Property Organisation (WIPO). Issues Paper (Unofficial Draft Version 3.0). Customary Law and the Intellectual Property System in the Protection of Traditional Cultural Expressions and Knowledge: page 5.

people's territory is unique and has its own laws".[64] In other words, national governments cannot legislate with respect to traditional and indigenous knowledge, but must give effect to and enforce local customary laws. Dr. Daes suggests the basis for this principle can be found in the International Labour Organization (ILO) Convention No 169 and in the Convention on Biological Diversity (CBD). However, it can be seen that it is strongly linked to cultural self-determination and to the rights to culture and participation.

Public Domain and Community-Based Documentation

The management of knowledge according to customary principles is directly relevant to concerns regarding the concept of the "public domain." This contested principle is not only relevant to the character of traditional knowledge within intellectual property frameworks, but also, it is in and of itself, a site of negotiation over the very different and often conflicting approaches to knowledge. The "public domain" is not irrelevant in a traditional context and indeed customary systems of managing knowledge often incorporate mechanisms which might be identified as a type of "public domain," further demonstrating the important role of customary law in identifying appropriate framework for traditional knowledge protection.

As well as a site of conflict, the ideology and legal concept of the 'public domain' is of particular significance for community knowledge in that much of the effort for protection within intellectual property systems has relied upon defensive protection and utilisation of the public domain. However, this trend toward defensive protection has been criticised by indigenous and traditional groups, not only as an unnecessary delivery

[64] Daes EA (2000) "Defending Indigenous Peoples' Heritage." Protecting Knowledge: Traditional Resource Rights in the New Millenium. Keynote Address. Union of British Columbia Indian Chiefs. 23-26 February: 5.

of community knowledge out of the management of the community, but also as a concept contrary to pre-existing community laws with respect to the governance of that knowledge:

> There is no public domain in traditional knowledge … Even knowledge shared and used widely does not fall into the public domain. When knowledge is shared, it is shared among those who are trusted to know their roles and responsibilities in using the knowledge … Misuse, even when used by others outside of the tribe, or by tribal members who are outside of the control of customary authority, can cause severe physical or spiritual harm to the individual caretakers of the knowledge or their entire tribe from their failure to ensure that the Creator's gifts are properly used. For this reason, misappropriation and misuse is not simply a violation of "moral rights" leading to a collective offense, but a matter of cultural survival for many Indigenous peoples.[65]

Therefore, intentional documentation and publication of community knowledge is not without weakness, not the least of which is the actual conflict with the needs and interests of community knowledge holders.[66] In this way, mechanisms to ensure the status of community knowledge as knowledge in the public domain (such as prior art databases,[67] digital libraries,[68] and the concept of *domaine public payant*[69]) continued to be

[65] Tulalip Tribes (2003) Statement by the Tulalip Tribes of Washgton on Folklore, Indigenous Knowledge, and the Public Domain. 9 July. WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. Fifth Session. Geneva, 5-17 July.

[66] Nevertheless, defensive protection has emerged as the dominant mechanism within the IGC, in the context of dissensus on the need for *sui generis* rights.

[67] For example, note the Traditional Ecological Knowledge Prior Art Database of AAAS which has met much criticism. See also the discussion of traditional knowledge as prior art in Ruiz M (2002) *The International Debate on Traditional Knowledge as Prior Art in the Patent System: Issues and Options for Developing Countries*. Trade-Related Agenda, Development and Equity (TRADE) Occasional Papers. Paper No 9. Geneva, South Centre.

[68] For example, the Traditional Knowledge Digital Library (TKDL) for Indian systems of medicine has met both positive (see Sen N (2002) "TKDL: A Safeguard for Indian Traditional Knowledge." 82(9) *Current Science* 1070) and negative receptions (see Sharma D (2002) "Digital Library Another Tool for Biopiracy." Mindfully.org. 29 May and Jayaraman KS (2002) "Biopiracy Fears Cloud Indian Database." *Science and Development Network*. 5 December). For more on the TKDL see CIPR (2002) Commission on Intellectual Property Rights. *Integrating Intellectual Property Rights and Development Policy*, London: 81. See the extensive report on databases and registers undertaken for the UNU-IAS in Alexander M et al (2003) The Role of Registers and Databases in the Protection of Traditional Knowledge: A Comparative Analysis. Report. Tokyo, UNU-IAS. See also the concerns regarding documentation and misappropriation in Tauli-Corpuz V. (2005). "Biodiversity, Traditional Knowledge and Rights of Indigenous Peoples." IPRs Series

emphasized as effective and logical mechanisms for protecting community knowledge.[70] This defensive approach has been rejected by indigenous and traditional groups as contrary to opportunities for relevant self-governance and self-determination with respect to that knowledge. In a recent Joint Statement to the 23rd session of the Working Group on Indigenous Populations,[71] the Indigenous World Association and Indigenous Media Network raised several concerns about the concept of the public domain and about the articulation of protection through the application of public and private databases:

> [W]e stress that there are striking similarities between seizing our territories and the taking of our knowledge by defining it as part of the public domain. Both are based on the notion that they constitute *res nullius*, the property of no one, and can be treated as such. Placing our knowledge into the public domain turns it into a freely available resource for commercial utilization. Thus, it also creates the pre-condition for using non-indigenous Intellectual Property Rights (IPR) regimes to patent "inventions" based upon our knowledge …We therefore strongly reject the application of the public domain concept to any aspect that relates to our cultures and identities, including human and other genetic information originating from our lands and waters.[72]

No 5. International Workshop on Traditional Knowledge. 21-23 September. UN Department of Economic and Social Affairs, Division for Social Policy and Development, Secretariat of the Permanent Forum on Indigenous Issues. PFII/2005/WS.TK/5.

[69] The *domaine public payant* (a paying public domain) involves the collection of funds from those seeking access to the knowledge within. Such funds would ordinarily be used towards programs within the communities of the traditional knowledge holders involved. See the discussion in Gervais D (2001) "Traditional Knowledge: A Challenge to the International Intellectual Property System." Fordham University Conference on International Intellectual Property Law & Policy. New York City, 20 April: 13. See also Dutfield G. (2002). Protection Traditional Knowledge and Folklore: A Review of Progress in Diplomacy and Policy Formulation. UNCTAD/ICTSD Capacity Building Project on Intellectual Property Rights and Sustainable Development. October: 34.

[70] Downes D (1997). "Using Intellectual Property as a Tool to Protect Traditional Knowledge: Recommendations for Next Steps." CIEL Discussion Paper. November; See also the discussion in Chapman AR (2001) "Approaching Intellectual Property as a Human Right" 35(3) *Copyright Bulletin* 4.

[71] Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Indigenous Populations.

[72] Indigenous World Association and Indigenous Media Network. (2005). Joint Statement. Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Indigenous Populations. 23rd Session, 18-22 July 2005. Review of Developments Pertaining to the Promotion and Protection of the Rights of Indigenous Peoples, Including Their Human Rights and Fundamental Freedoms: Principle Theme, "Indigenous Peoples and the International and Domestic

Once again, the links between contemporary community knowledge debates and colonialism are relevant to the question of the legitimacy (or lack of legitimacy) for such approaches. While defensive approaches are an aspect of mechanisms of protection, they risk an ongoing paternalism and persistent historicising of the value of knowledge.

Conclusion: Local Customary Law and International Frameworks

Indigenous and traditional groups have called for *sui generis* protection that recognizes the customary laws of communities: "Our existing protection systems are legitimate on their own right and any new mechanisms for protection, preservation and maintenance of traditional knowledge and associated biological resources must respect and be complementary to existing systems and not undermine or replace them."[73] At the 12th Session of the WIPO IGC in February 2008, advocates for *sui generis* protection argued that the passage of the UN Declaration is significant support and foundation for this approach.

The basis for the recognition of customary law can be found in several international instruments and sources with respect to distinct issues,[74] resulting in a multilateral justification for the deference to customary law with respect to community

Protection of Traditional Knowledge." Item 4(b) of the provisional agenda. 13 July 2005. E/CN.4/Sub.2/AC.4/2005/CRP. 3.

[73] Indigenous Peoples Council on Biocolonialism (IPCB) (2004b) Collective Statement of Indigenous Peoples on the Protection of Indigenous Knowledge. Agenda item 49(e): Culture. UN Permanent Forum on Indigenous Issues (PFII). Third Session, New York, 10-21 May 2004.

[74] Regard for customary law is set out in several international instruments, including: the International Labour Organization (ILO) Convention No 169, Article 8; which refers explicitly to customary law, and builds upon the ILO Convention No 107 on Indigenous and Tribal Populations, which makes similar provisions in Article 7. The Right to Self-Determination, examined in more detail in Chapter 8 in this context, is provided for in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in Article 1 of each instrument, the Declaration on the Right to Development in the Preamble, and Articles 1 and 5; the Vienna Declaration on Human Rights and Programme of Action in Article 2. The United Nations Draft Declaration on the Rights of Indigenous Peoples is explicit in Article 9.

knowledge as identified in those separate and operable issues. Although this amounts to recognition of customary law in each case, these disparate approaches may undermine the potential for cooperation within the WIPO IGC in the form of *sui generis* protection.

Significantly, however, the creation and exercise of conventional intellectual property rights may be subject to pre-existing customary laws and communal rights of the relevant community. Such rights may indeed impact the exercise of intellectual property rights (including the exclusion of non-traditional use) with repercussions for failure to observe these pre-existing laws. Indeed, membership of various intellectual property conventions does not oblige an intellectual property holder to act contrary to other laws. For example, Article 17 of the Berne Convention, the IGC notes that "in the event that customary laws were to be recognized for this purpose by a country's laws, copyright does not entitle or oblige a traditional artist to act contrary to his or her customary responsibilities."[75] Nevertheless, the relevance of such provisions necessarily rests upon the national government's recognition of customary laws, which is in doubt given the history of the troubled passage of the UN Declaration. Indeed, it rests upon the significance vested in the principle of locality and its current development within international law.

[75] WIPO/GRTKF/IC/4/3 (20 October 2002): 23.